

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PARASTINO	:	Civil Action
	:	
v.	:	
	:	
CONESTOGA TELEPHONE AND	:	
TELEGRAPH COMPANY	:	
and	:	
COMCAST METROPHONE	:	No. 99-679

MEMORANDUM

Ludwig, J.

August 18, 1999

Defendants Conestoga Telephone and Telegraph Company and Comcast Metrophone move to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).<sup>1</sup> Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367.

According to the complaint, in January-March, 1997, defendants wrongfully disclosed plaintiff Michael Parastino's confidential telephone records to third parties without his consent. Compl., at 2. The complaint alleges violations of the Federal Communications Act, 47 U.S.C. § 222, and state law breach of contract.<sup>2</sup>

---

<sup>1</sup>Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle him to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

<sup>2</sup>On January 29, 1999, plaintiff filed a complaint. Thereafter, he served an amended complaint in which a Count V against Conestoga for overcharges had been added. The amended complaint was not filed of record. In their motions to dismiss, Comcast addressed the original complaint and Conestoga the amended complaint. Because the amended complaint was not filed, the motions to dismiss

Section 222 of the Federal Communications Act provides, in relevant part:

Privacy requirements for telecommunications carriers. Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C.A. § 222(c)(1) (West Supp. 1999) (emphasis added).

Defendants argue that the complaint fails to state a claim upon which relief can be granted because their disclosures of information were “required by law.”<sup>3</sup> Specifically, defendants assert that disclosure was required in response to subpoenas issued in state criminal proceedings against plaintiff.. Conestoga mot., ex. B; Comcast mot., ex. A.<sup>4</sup>

Plaintiff does not dispute that defendants would be entitled to disclose his confidential records in response to a valid subpoena. Instead, plaintiff argues that

---

will be considered only with respect to the original four counts set forth in the original complaint.

<sup>3</sup>Defendants contend that the complaint should have pleaded that disclosure was not “required by law.” Plaintiff counters that “required by law” is an affirmative defense. Regardless, a motion to dismiss based on an affirmative defense may be granted when it appears on the face of the pleadings. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994).

<sup>4</sup>Because the subpoenas are matters of public record, they may be considered in deciding whether to dismiss under Rule 12(b)(6). See Beverly Enterprises, Inc. v. Trump, \_\_\_ F.3d \_\_\_, \_\_\_ (3d Cir. 1999) (“[I]n deciding a motion to dismiss, courts generally may consider only the allegations contained in the complaint, exhibits attached thereto, and matters of public record.” (citing Pension Ben. Guar. Corp. v. White Consol. Ind., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993))).

(1) the subpoena to which Conestoga responded was “bogus” and (2) both defendants were required to produce the records at a preliminary hearing and should not have mailed the records in advance of the hearing. Accordingly, he maintains these disclosures do not fall within the “required by law” exception. Pl. resp. at 2.

As to the validity of the subpoena directed to Conestoga, new factual allegations made in the parties’ legal memoranda may not be considered in resolution of a 12(b)(6) motion to dismiss. See Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, 836 F.2d 173, 181 (3d Cir. 1988) (“[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”); Chester Residents for Quality Living v. Seif, 944 F. Supp. 413, 416 (E.D. Pa. 1996) (considering only plaintiff’s original allegations and refusing to allow “informal amendment through [plaintiff’s] response brief”); Gundlach v. Reinstein, 924 F. Supp. 684, 688 n.4 (E.D. Pa. 1996) (refusing to consider allegation that was not in complaint but appeared for the first time in plaintiff’s legal memoranda regarding 12(b)(6) motion). Considering only the allegations of the complaint and the subpoena - a document of public record - plaintiff has not stated a claim upon which relief may be granted.

As to the production of documents prior to the preliminary hearing, even if the matters set forth in plaintiff’s brief could be considered, this argument is meritless. The subpoenas duces tecum explicitly allowed defendants to submit the requested documents in lieu of appearing at the hearing. Conestoga mot., ex.

B; Comcast mot., ex. A.<sup>5</sup>

Inasmuch as the Federal Communications Act (Counts I and II) is the sole basis for federal subject matter jurisdiction, jurisdiction will be declined over the remaining state law claims (Counts III and IV). See 28 U.S.C. § 1367(c) “The district courts may decline to exercise supplemental jurisdiction over a claim [if] . . . (3) the district court has dismissed all claims over which it has original jurisdiction . . . .”).

Accordingly, defendants’ motions to dismiss are granted.<sup>6</sup>

---

Edmund V. Ludwig, J.

---

<sup>5</sup>Plaintiff’s request for leave to amend the complaint as to Conestoga will be granted. Fed. R. Civ. P. 15(a). As to Comcast, the request to amend will be denied because the amendment would not cure the defects in plaintiff’s claim.

<sup>6</sup>Because the motions to dismiss have been granted on the “required by law” exception, it is not necessary at this time to discuss or decide defendants’ other arguments.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PARASTINO	:	Civil Action
	:	
v.	:	
	:	
CONESTOGA TELEPHONE AND	:	
TELEGRAPH COMPANY	:	
and	:	
COMCAST METROPHONE	:	No. 99-679

**ORDER**

AND NOW, this \_\_\_\_ day of August, 1999, the motions to dismiss of defendants Conestoga Telephone and Telegraph Company and Comcast Metrophone are granted. Fed. R. Civ. P. 12(b)(6).

Judgment is entered in favor of defendant Comcast Metrophone. By September 3, 1999, plaintiff may file an amended complaint with respect to defendant Conestoga. Otherwise, without more, this action will be dismissed.

---

Edmund V. Ludwig, J.